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NO. LTC # 271-2007

LETTER TO COMMISSION

TO: Mayor Matti H. Bower and Members of the City Commission

FROM: Jorge M. Gonzalez, City Manager
Jose Smith, City Attorney

DATE: December 5, 2007

SUBJECT: Invitation to Bid (ITB) No. 34-06/Multipurpose Municipal Parking Facility (the Bid)

City's Response to Request by MCM Corporation for Reconsideration of Bid Award

The following responds to Attorney Alex Heckler's letter to Mayor Bower and the City Commissioners, dated December 5, 2007 (and attached hereto), on behalf of MCM Corp., requesting that the City Commission's award of the above referenced Bid to The Tower Group on November 21, 2007, be brought up for reconsideration at the City Commission Meeting of December 12, 2007. For the reasons set forth below, a motion for reconsideration of the Bid award is not recommended, particularly since counsel for MCM has failed to set forth either a legal and/or factual basis for same.

Counsel for MCM is requesting a reconsideration of the action taken by the City Commission at its November 21, 2007 Meeting, awarding a contract to The Tower Group, as the lowest and best bidder pursuant to ITB No. 34-06/07 for the Multipurpose Municipal Parking Facility (the Bid). In support of this, he alleges that the City Commission violated MCM's due process rights, citing a violation under Section 5 ("Right to be heard") of the Citizens' Bill of Rights under the City Charter. There is no legal support for counsel's conclusion.

While the City Charter gives interested persons the right to appear before the City Commission or any City board, committee, and/or department for the "...presentation, adjustment or determination of an issue, request or controversy within the jurisdiction of the City" this right is not absolute and is conditioned and subject to "...so far as the orderly conduct of public business permits, ..." Additionally the same section of the Citizens' Bill of Rights cited by counsel for MCM also provides that "Nothing herein shall prohibit the city or any agency thereof from imposing reasonable time limits on the presentation of a matter." (See City Charter, "Citizens' Bill of Rights" at Section (A)5.).

The Mayor's action in limiting speakers during consideration of award of the Bid was not prohibited by the Charter and properly within his discretion (as the chair of City Commission meetings). It should also be noted that the agenda item itself was not noticed as a public hearing (as there is no legal requirement to do so). Therefore, while, in the past, the City Commission has allowed speakers (including other bidders) to speak before the Commission prior to the award of a bid, there is no requirement under the City Charter and/or City Code to do so.

More importantly, MCM's due process rights with respect to its protest of the award of the Bid were satisfied pursuant to the City's compliance with its Bid Protest Ordinance, as codified in Sections 2-370 through 2-372 of the Code. MCM filed a written bid protest which was responded to in writing (and denied) by the City Manager. Under the City's bid protest procedures, following denial of a bid protest by the City Administration, there is no right of appeal to the City Commission; rather, Section 2-371(2)(f) of the Code states that "Any person aggrieved by any action or decision of the city manager, the city attorney, or their respective designees, with regard to any decision rendered under this section [i.e. the Bid Protest Ordinance] may appeal said decision by filing an original action in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, in accordance with the applicable court rules... ." [Brackets supplied].

Finally, counsel's letter not only seeks to re-introduce issues that were already addressed and replied to by the City in its response to MCM's bid protest and, where dealing with issues of responsiveness, are not properly within the City Commission's purview (See Section 2-371(2)(e) of the Code). Additionally, counsel also raises a new issue in his letter (with regard to the Technical Review Panel's recommendation under the ITB not being unanimous) that was not raised in MCM's original protest and is thus deemed waived under the City's Bid Protest Ordinance (See Section 2-371(2) (j) of the Code). None of these factual issues should be considered by the City Commission, much less serve as the basis for any reconsideration of the Bid award.

As MCM's bid protest has been properly addressed and responded to in accordance with the City's Bid Protest Ordinance and, further, as said Ordinance does not provide disgruntled bidders with an absolute right of appeal to the City Commission, MCM's request for a motion to reconsider the Bid award, based upon an alleged violation of its due process rights, is not valid, and should therefore be denied.

C: Robert Parcher, City Clerk

**SHUTTS
&
BOWEN
LLP**

ATTORNEYS AND COUNSELLORS AT LAW

December 5, 2007

VIA E-MAIL

Mayor Matti Herrera Bower
The Office of the Mayor and Commission
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

**Re: Item R7C (Nov. 21, 2007 Agenda)
ITB No. 34-06/07, Multipurpose Municipal Parking Facility**

Dear Mayor Bower:

This firm represents Magnum Construction Management Corporation ("MCM") with respect to the above-referenced procurement. I am writing to you today to express my frustration and concern for the process and treatment that I received during the hearing of that item on Wednesday, November 21, 2007. As a community activist and public official with a reputation for inclusion and encouragement of public input, we hope you will agree that the refusal to hear our client speak on this topic of great importance was not in the City's best interest. Moreover, we believe you will agree that it represented a serious violation of the City Charter and the due process rights afforded to interested parties in connection with City business. The purpose of this letter is to request that this matter be brought up for reconsideration so that we may have the opportunity to make a presentation to the Commission concerning our protest.

MCM's Protest

As you know, MCM is an interested party to this procurement by virtue of its bid, and also because of its subsequent protest based upon a number of grounds. Amongst other concerns, the protest pointed out that the City had not properly weighed the evaluation criteria and was not aware that the selected firm, The Tower Group, had recently been terminated by the Palm Beach Solid Waste Authority for cost-overruns and delays. Worse still, the City was also unaware of similar overruns and delays related to Tower Group's work on the South Dade Cultural Center, which are now widely publicized. Additionally, we pointed out that under the rules established in the ITB, the Technical Review Panel did not have the authority to make any recommendation because it was not unanimous: thus, the City Commission was legally required to evaluate each proposer and to reach its own decision. The City Commission was never

informed of this, and the process set forth in the procurement documents has been compromised as a result.

Unfair Treatment Before the City Commission

We conveyed many of these important concerns to Mayor Dermer prior to the meeting by letter and expressly requested an opportunity to be heard for a brief presentation to the City Commission. This presentation was not only vital for informing the Commission about the project risks, but also to legally assert that the recommendation was not allowed under the ITB. As you witnessed at the meeting, debate was cut off before we were permitted to speak or present, and the Commission voted to select the Tower Group without public input. When we pointed out that the City Charter and state law afforded us and others who wished to speak due process as interested parties, we were told to "enjoy those (due process rights) on some other day".

That remark, and the fundamental denial of our right to be heard flies in the face of the City's Charter, which for good reason provides that "*any interested person* has the right to appear before the City Commission... for the presentation, adjustment or determination of an issue, request or controversy within the jurisdiction of the City." See: City Charter, Citizens' Bill of Rights, Section 5. Worse still, the fact that we were not provided even the most meager due process was compounded by incorrect statements made to the Commission in order to foreclose questions raised by Commissioners on the dais¹. For example, the Commission was incorrectly informed that Tower Group's termination on a major project for the Solid Waste Authority was not material because it came to light after the bid submissions. Likewise, the Commission was told that the Solid Waste Authority termination, and Tower Group's ongoing cost-overruns in Dade County were mere *responsiveness* disclosures due at the time of the submittal and had no bearing on responsibility. That was plainly wrong. A bidders ability to complete the work in a professional, cost-effective and timely manner is the very definition of *responsibility* criteria. Moreover, the ITB empowered the City to investigate information presented to it after the submittal deadline.² I am certain you will agree that the City Commission has a duty to weigh whether Tower Group was a responsible company in light of the severe cost-overruns and questionable projects undertaken in other cities. With all that is at stake, we hope that you will take the opportunity to hear the facts about the Tower Group's recent performance, and cost-effective alternatives available to the Commission. Moreover, the City should re-look at this procurement if only to take up the defects of the previous hearing and make an award that is not subject to judicial challenge.

¹ For instance, Tower Group was never required to answer one Commissioner's inquiry whether their price was firm. Likewise, Tower Group was told not to answer a Commissioner's question about its ongoing work history.

² For example, section 11 of the ITB reserved the City's right to "investigate and explore" the experience and history of bidders.

Conclusion and Requested Relief

In sum, we note that the purpose of this letter is not to solicit your support for award of this contract to MCM; rather, we simply request that the City Commission hear our presentation detailing our bid protest in order to make an informed decision in accordance with due process. Because the decision of the Technical Review Panel was not unanimous the City Commission is required to make an independent determination as to which proposal is in the best interests of the City. It may well be that after evaluating the new facts, the City will decide that Tower Group is a responsible contractor that can be trusted to complete the project on time and on budget. We believe, however, that when you review the correspondence and interview the other government agencies involved that you will reach a different conclusion. In either case, due process, fair and open proceedings, and taxpayer equity all demand that the City Commission weigh all available evidence before committing an important piece of real estate and substantial tax dollars for this project.

I would appreciate the opportunity to speak with you in greater detail, and hope that you will allow us the opportunity to air our concerns before the Commission.

Sincerely,

SHUTTS & BOWEN LLP



Alexander P. Heckler

CC: City Commission
City Manager
City Attorney